

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOE A. THOMAS**

Claimant

VS.

**ERNEST-SPENCER INC.**

Respondent

AND

**LIBERTY MUTUAL INSURANCE CO.**

Insurance Carrier

Docket No. 237,572

**ORDER**

Claimant requests review of an Order entered by Administrative Law Judge Bryce D. Benedict on November 15, 2002. The Board heard oral argument on April 2, 2003.

**APPEARANCES**

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

**ISSUES**

The claimant filed an application for post-award medical treatment and his deposition was scheduled. Respondent filed a motion to quash the deposition. After a hearing on the motion, the Administrative Law Judge (ALJ) entered a November 15, 2002, Order which granted the motion to quash the deposition, without any explanation as to the basis for that decision.

Claimant requested review of the order quashing his deposition. Claimant argues that a previous denial of post-award medical treatment does not prevent additional litigation of that issue. Claimant further argues there is no legal basis to prevent claimant from testifying in support of his current need for medical treatment. Lastly, claimant requests attorney fees.

Respondent argues the claimant's previous request for post-award medical treatment was denied because claimant had suffered intervening accidents. Respondent argues such findings prevent claimant from again attempting to establish a relationship between his current need for treatment and the work-related accident.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A brief recitation of the history of this claim is necessary. On December 8, 2000, the parties entered into an Agreed Award that reserved claimant's right to apply for future medical treatment. Claimant filed an application for post-award medical on February 16, 2001, but the request did not proceed to hearing until March 14, 2002. The ALJ entered an Award on June 6, 2002, denying claimant's request for additional treatment. The ALJ noted:

The burden of proof is upon the Claimant. He has presented no expert testimony which would link any need for treatment to the August 1998 work accident. The Respondent has presented the opinion of the treating physician who in 1999 could not associate the Claimant's symptoms with the work accident. Since that time the Claimant has worked for other employers, and following a move to Colorado has experienced a worsening of his symptoms.

The Court finds that the Claimant has not met his burden of proof to show that his symptoms are related to his work accident.<sup>1</sup>

Claimant requested Board review of the ALJ's Award. On June 21, 2002, while the request for Board review was pending, the claimant filed a second application for post-award medical.

On October 2, 2002, claimant sent respondent a Notice to Take Telephonic Deposition of the claimant on October 16, 2002. The respondent, on October 14, 2002, filed the Motion to Quash Telephonic Deposition.

A hearing was held on the motion to quash on November 13, 2002. Claimant argued that he was proceeding on a new request for medical treatment and was not attempting to modify the ALJ's previous decision. The claimant argued that he interpreted the ALJ's Award to deny medical treatment because of a failure to meet his burden of proof due to the absence of expert medical testimony regarding the cause of his need for additional medical treatment. Claimant argued that his testimony was necessary to provide

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<sup>1</sup> Award at 2.

an update regarding his condition and activities which would be used in conjunction with expert medical testimony to establish the work-related connection to his current need for medical treatment. In response, the respondent argued the claimant could not proceed until an appellate decision was reached on his first application for post-award medical. In addition, the respondent argued the ALJ based his denial of medical treatment upon the fact that the claimant's present need for treatment, if any, was not caused by the work-related accident and, instead, there was evidence of intervening events which caused the present need for treatment. The ALJ granted respondent's motion to quash the deposition.

On November 27, 2002, the Board entered its decision affirming the ALJ's Award denying claimant's first application for post-award medical treatment.

A post-award medical hearing is entitled to a priority setting by the ALJ.<sup>2</sup> It is clear that such proceedings are to be accorded an expedited hearing. And all the parties to a post-award proceeding are entitled to present evidence, including taking testimony on any disputed matters.<sup>3</sup> Although not bound by the technical rules of procedure, the ALJ is required to give the parties a reasonable opportunity to be heard and to present evidence, to insure the employee an expeditious hearing and to act reasonably without partiality.<sup>4</sup>

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.<sup>5</sup> In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.<sup>6</sup>

As noted, the claimant has the burden of proof to establish that his need for post-award medical treatment is causally related to the injury suffered in the underlying accident. That burden remains the same even if claimant has suffered intervening accidents. It is simply a matter of proof. And although the passage of time and intervening accidents may increase the claimant's difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

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<sup>2</sup> K.S.A. 44-510k(b).

<sup>3</sup> K.S.A. 44-510k(a).

<sup>4</sup> K.S.A. 44-523(a).

<sup>5</sup> K.S.A. 44-501(a).

<sup>6</sup> K.S.A. 44-510k(a).

If the proffered evidence is cumulative, redundant or does not provide any new facts there are remedies available to the ALJ to prevent frivolous filings, such as assessing costs and not awarding attorney fees. But the post-award statute provides that the parties must be given the opportunity to present testimony on disputed matters and that includes claimant's testimony.

The claimant's deposition was scheduled to update his condition and activities since he had last testified during his first post-award hearing some seven months earlier. Another deposition does not appear unduly burdensome and testimony regarding claimant's present condition would appear to be no less relevant regarding his application for post-award treatment than that of a physician or his co-workers. In the interest of justice and to eliminate further delay in the resolution of this matter, the Board reverses the ALJ's decision granting the motion to quash claimant's deposition and remands this matter for further proceedings.

The issue of claimant's attorney's entitlement to an award of a reasonable fee pursuant to K.S.A. 44-536(g) should first be presented to the ALJ, including any claim for attorney fees connected with this appeal.

#### **AWARD**

**WHEREFORE**, Administrative Law Judge Bryce D. Benedict's Order dated November 15, 2002, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director